No.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. .....

WESTERN AUTO SUPPLY COMPANY,
Petitioner

vs.

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE and HARRY CLINK-SCALES, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 2, 1960.

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 92-93) is unreported and is printed in the Appendix hereto, *infra*, pp. A2-3. The opinion and order of the District Court dated April 11, 1960 (R. 22-31), is unreported and appears in the Appendix hereto, *infra*, pp. A4-14. The first opinion of the Circuit Court of Appeals in this litigation dated July 16, 1959, printed in the Appendix hereto, *infra*, pp. A15-25, is reported in 269 F.2d 332. The first opinion and order of the District Court in this litigation dated November 18, 1958, printed in the Appendix hereto, *infra*, pp. A26-39, is reported in 167 F. Supp. 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 2, 1960 (R. 94), and is printed in the Appendix hereto, *infra*, p. A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

On November 18, 1958, the District Court entered an order dismissing respondents' first amended complaint. That order was affirmed without modification by the court below on July 16, 1959, but the court below remanded the case, stating that the remand was to permit respondents to apply to the sound discretion of the District Court for leave to file an amended complaint. Respondents, without moving to vacate the order of dismissal, filed a motion to amend their complaint and the District Court overruled that motion.

The sole question presented by this petition is whether, in view of the fact that respondents never moved to vacate or modify the final order of dismissal entered by the District Court and affirmed by the Court of Appeals, the District Court had jurisdiction to entertain respondents' motion for leave to file their proposed second amended complaint.

RULE INVOLVED

The rule involved is Rule 60(b) of the Federal Rules of Civil Procedure, which in so far as pertinent provides as follows:

> "(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

STATEMENT

This suit was commenced under Section 4 of the Clayton Act (15 U.S.C. §15) seeking treble damages for claimed violations of the antitrust laws of the United States. The original complaint was filed on June 3, 1957, and thereafter respondents voluntarily filed their first amended complaint (R. 22, 31-61; Appendix, *infra*, pp. A4-5). Petitioner moved to dismiss the first amended complaint for failure to state a claim and on November 18, 1958, the District Court entered its order sustaining the petitioner's motion (R. 22; Appendix, *infra*, pp. A5, A26-39). Respondents appealed from that ruling to the court below and on July 16, 1959, that court handed down its opinion affirming the order of dismissal. In its opinion the court below affirmed without purporting to vacate or modify the judgment of dismissal but stated that it was remanding the case to permit plaintiffs to apply to the sound discretion of the District Court for permission to amend their complaint (Appendix, *infra*, pp. A23-25). The mandate issued by the court below on August 17, 1959, in so far as pertinent, provided as follows (R. 62-63):

> "It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Spartanburg, to permit further application to be made by the plaintiffs in conformity with the opinion of the Court filed herein."

On September 1, 1959, respondents filed a motion "To Amend Complaint in Conformance with Opinion of the United States Court of Appeals for the Fourth Circuit"

(R. 3) and appended thereto was their proposed second amended complaint (R. 3-22). Petitioner opposed the motion on the ground, *inter alia*, that the District Court was without jurisdiction to entertain the motion because the final order of dismissal entered by the District Court on November 18, 1958, had never been vacated or modified and at no time had respondents applied to any court for an order vacating or modifying the order of dismissal. The District Court in its opinion and order dated April 11, 1960 (R. 22-31; Appendix, *infra*, pp. A4-14) stated that there appeared "to be considerable merit" in petitioner's contention but that it was unnecessary for the court to pass upon the question because it was overruling the motion for leave to amend on the merits (R. 25; Appendix, *infra*, pp. A7-8). Respondents appealed and on November 2, 1960, the court below filed a *per curiam* opinion reversing the District Court without discussing the jurisdictional question raised by petitioner (R. 92-93; Appendix, *infra*, pp. A2-3). Accordingly, judgment was entered on the same date remanding the case to the District Court for further proceedings in accordance with the opinion (R. 94; Appendix, *infra*, p. A1).

REASONS FOR GRANTING WRIT

Petitioner, for reasons hereinafter stated, believes that there is a direct conflict between the decision of the court below and the decision of the Court of Appeals for the Eighth Circuit in *Young* v. *Garrett*, 159 F.2d 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young* v. *Garrett*, 5 F.R.D. 117 (1946). However, petitioner's application for a writ of certiorari raises the basic question whether this Court

should, in the exercise of its supervisory jurisdiction, enforce the established rules of federal procedure.

1. The court below originally entered a judgment unconditionally affirming the original order of dismissal by the District Court. If the court below contemplated continuance of the litigation it should have conditioned its order in accordance with accepted practice in other jurisdictions. Cf. *Lipson* v. *Socony-Vacuum Corp.*, 76 F.2d 213 (1st Cir. 1935).[1] The court below not only failed to follow the accepted practice for restoring the case to the trial docket of the District Court but, when confronted with the question on subsequent appeal, completely ignored petitioner's contention that the litigation had been finally terminated by the original affirmance. That the original judgment of the court below may have been entered inadvertently is not of importance.[2] Respondents could have applied for correction of the judgment and mandate of the court below within the term at which that judgment was entered. *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 129 F.2d 481 (7th Cir. 1942). It is not of importance whether respondents might have made application to

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1. In the *Lipson* case the Court of Appeals for the First Circuit upheld the decision of the District Court sustaining a demurrer to the declaration but conditioned its affirmance in the following terms (76 F.2d 218):

> "The judgment of the District Court in each case is vacated, provided the plaintiff files an amendment to his declarations within fifteen days from the date when the mandate is handed down; otherwise the judgment of the District Court in each case is affirmed with costs."

2. In somewhat similar circumstances the Court of Appeals for the Third Circuit frankly admitted that it erred in attempting to restore a case to the docket of the District Court. *Montgomery* v. *Realty Acceptance Corp.*, 51 F.2d 642, 643 (3rd Cir. 1931), aff'd 284 U.S. 547 (1932).

the District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure following the affirmance of the original order of dismissal by the Court of Appeals for relief from that order. Respondents have never at any time sought such relief and it was an essential prerequisite that they do so before a motion to amend could be entertained. *Knox* v. *First Security Bank of Utah*, 206 F.2d 823, 826 (10th Cir. 1953); *Cooper* v. *R. J. Reynolds Tobacco Company*, 256 F.2d 464 (1st Cir. 1958), cert. den. 358 U.S. 875 (1958).

Rules of procedure may sometimes appear arbitrary and, as in this case when they deprive a court of jurisdiction, unnecessarily harsh. However, those rules are the rules approved by this Court and the rules applicable to all litigation in the federal courts. Essentially the rule which petitioner advocates is founded upon the principle of *res judicata*. Like statutes of limitations, it is a rule of repose and is based upon the concept that the public interest requires the termination of all litigation.

2. An additional reason why the writ should be granted lies in the fact that the decision in the court below is in direct conflict with the judgment of the Court of Appeals for the Eighth Circuit in *Young* v. *Garrett*, 159 F.2d 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young* v. *Garrett*, 5 F.R.D. 117 (1946). There, as in this case, the District Court granted a motion to dismiss and on appeal the order of dismissal was affirmed. Plaintiffs then applied for a rehearing in the Court of Appeals or, in the alternative, for a remand to allow them to amend their complaint. The Court of Appeals denied the petition for a rehearing but directed (5 F.R.D., 119-120):

> "* * * 'that the case be remanded to the District Court with instructions to permit the appellant

(plaintiff in Civil Action No. 163 and plaintiffs in Civil Action No. 164) to apply to that court for leave to amend his complaint, if he so elects, for the purpose of stating jurisdiction, if possible (see, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8 Cir., 121 F.2d 561, and Rule 15, Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c), provided that such application be made within a reasonable time and not later than October 1, 1945; and for such further proceedings as are not inconsistent with the opinion of this Court.'"

In due course plaintiffs applied to the District Court for leave to amend and the District Judge held that despite the instructions from the Court of Appeals he had no power to permit an amendment. The court said (5 F.R.D., 121):

> "The plaintiffs were satisfied and insisted upon their original complaints and never indicated any desire to amend until the judgments of dismissal were affirmed on May 9, 1945. *Young* v. *Garrett et al., supra.* To permit the amendment now, it would be necessary for this Court to modify the judgments appealed from and affirmed. This court does not have such power. * * *"

On appeal the Court of Appeals for the Eighth Circuit affirmed the District Court without discussing the jurisdictional point. *Young* v. *Garrett*, 159 F.2d 634 (1947). However, in subsequent litigation between the same parties the Supreme Court of Arkansas had occasion to summarize the proceedings in the federal courts. *Young* v. *Garrett*, 208 S.W.2d 189 (S. Ct. Ark. 1948). In doing so the court stated (p. 192):

> "When the Court of Appeals refused to grant a rehearing and affirmed Judge Miller's order of dismissal, it appears to have attempted to confer upon

> the trial court a power subsequently found to be non-existent. That is the effect of Judge Miller's holding, and on appeal for the second time in these cases he was not reversed. So, in effect, rights of the parties to maintain their suits in Federal Court were settled by the appellate court August 8, 1945, and under Rule 60(b) the judgment was a finality. * * *"

3. On the basis of what has been said above, it is submitted that the question presented is of importance to the orderly administration of justice. We believe that the judgment of the court below is erroneous because it is contrary to the basic principle that once a judgment of a trial court has been affirmed by an appellate court the trial court has no power to disturb that judgment. See, *Home Indemnity Co. of New York* v. *O'Brien*, 112 F.2d 387 (6th Cir. 1940); *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259 (3rd Cir. 1953); *Knox* v. *First Security Bank of Utah*, 206 F.2d 823 (10th Cir. 1953); *Ginsburg* v. *Stern*, 263 F.2d 457 (3rd Cir. 1959).

The question presented is one of jurisdiction which this Court should decide. Cf., *Bruner* v. *United States*, 343 U.S. 112 (1952); *Realty Acceptance Corp.* v. *Montgomery*, 284 U.S. 547 (1932). That the decision of the court below is interlocutory in the sense that it purports to convey jurisdiction on the District Court is of no significance. See, *Land* v. *Dollar*, 330 U.S. 731, 734(n.2) (1947); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685(n.3) (1949); *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 52 (1938). Resolution of the question involved will not only be of substantial benefit to the parties but may serve to avoid very protracted litigation which will be most burdensome to the courts below. The Court will note from respondents' first amended complaint and from respondents' proposed second amended complaint that this

litigation actually consists of six separate antitrust suits filed against petitioner. That alone is sufficient to indicate the time and expense that a trial would involve.

It is respectfully suggested that the public interest will best be served if the jurisdictional question here presented be decided before protracted litigation is commenced in the courts below.

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be granted.

JAMES C. WILSON,
ALFRED F. BURGESS,
LOUIS L. POPLINGER,
Attorneys for Petitioner.

At

JUDGMENT

Filed and Entered November 2, 1960.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8121

McElhenney Co., Inc., W. F. Snipes, J. T. Snipes, George Toole, Mac Toole, R. P. Swofford, Charles L. Gasque and Harry Clinkscales, Appellants,

vs.

Western Auto Supply Company, Appellee.

APPEAL FROM the United States District Court for the Western District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Greenville, for further proceedings in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

Filed Nov. 2. 1960. R. M. F. Williams, Jr., Clerk.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8121.

McElhenney Co., Inc., W. F. Snipes, J. T. Snipes, George Toole, Mac Toole, R. P. Swofford, Charles L. Gasque and Harry Clinkscales, Appellants,

versus

Western Auto Supply Company, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG. ASHTON H. WILLIAMS, DISTRICT JUDGE.

(Argued October 6, 1960. Decided November 2, 1960)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Chester D. Ward, Jr., for Appellants, and James C. Wilson and Alfred F. Burgess (Louis L. Poplinger, and Wyche, Burgess & Wyche on brief) for Appellee.

PER CURIAM:

When this treble damage action for violation of the anti-trust law came here in an earlier appeal we remanded the case to afford the plaintiffs an opportunity to apply to the District Court for leave to amend their complaint. An amended complaint was submitted by the plaintiffs to that court together with an appropriate motion for leave to file the same. The defendant opposed the plaintiffs'

motion and the court entered an order denying it and dismissing the action. This second appeal followed.

The hearing before us took a wide range, in which many questions of anti-trust law were debated by counsel, but we find it unnecessary to rule upon them in the abstract in advance of trial. We have concluded that the amended complaint tendered by the plaintiffs stated a cause of action under section 3 of the Clayton Act, entitling them to a trial, and that leave to file the amended complaint should have been granted. We do not, however, preclude resort by the defendant to customary procedures of pretrial practice to obtain additional pertinent information with respect to the particulars of the unlawful acts and agreements charged in the complaint and the relationship between the participants therein. Nor do we express any opinion as to the legal sufficiency of the allegations of specific facts contained in the original but omitted from the amended complaint.

Reversed and remanded for further proceedings.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION.

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE and HARRY CLINKSCALES,

Plaintiffs,

vs.

WESTERN AUTO SUPPLY COMPANY,

Defendant.

CIVIL ACTION

No. 2135

ORDER

This suit is brought under Section 4 of the Clayton Act (15 U.S.C.A. 15) seeking treble damages for claimed violation of Section 3 of the Clayton Act (15 U.S.C.A. 14). The case is before the Court on plaintiffs' motion for leave to file their second amended complaint. The parties are described and the facts upon which this controversy is predicated are summarized in the order of this Court dismissing plaintiffs' first amended complaint (167 F. Supp. 949) and the opinion of the Court of Appeals for this Circuit affirming that order (269 F.2d 332).

Prior Proceedings

The original complaint in this case was filed June 3, 1957. Thereafter plaintiffs voluntarily filed their first

amended complaint. Defendant filed a motion to dismiss for failure to state a claim and this Court entered its order sustaining that motion on November 18, 1958. Plaintiffs did not seek leave to file an amended complaint as they might have done under Rule 15 (a) of the Federal Rules of Civil Procedure but instead appealed to the Court of Appeals for this Circuit. On July 16, 1959, the Court of Appeals handed down its opinion affirming the order of this Court dismissing the complaint.

The Court of Appeals, although expressing "doubt that they could replead effectively", undertook to remand the case to this Court "to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint." The pertinent portion of the Court's mandate provides:

> "It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be and the same is hereby affirmed with costs and that this cause be and the same is hereby remanded to the United States District Court for the Western District of South Carolina at Spartanburg to permit further application to be made by the plaintiffs in conformity with the opinion of the Court filed herein."

On September 3, 1959, plaintiffs filed a motion denominated "Motion of Plaintiffs to Amend Complaint in Conformance with Opinion of United States Court of Appeals for the Fourth Circuit". To that motion was appended plaintiffs' proposed second amended complaint. At no time following their unsuccessful appeal have plaintiffs sought to have this Court's order of dismissal set aside, altered or amended.

Jurisdiction

The defendant urges that despite the fact that the Court of Appeals remanded the case to permit plaintiffs to apply for leave to amend, the judgment of dismissal is now final and this Court does not have power to reopen the case by permitting an amendment. It is defendant's contention, *first*, that a judgment of outright dismissal is a final judgment which cannot be disturbed by the trial court after it has been affirmed by an appellate court (*Home Indemnity Co. of New York* v. *O'Brien*, 112 F.2d 387 (6th Cir. 1940); *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259 (3rd Cir. 1953); *Knox* v. *First Security Bank of Utah*, 206 F.2d 823 (10th Cir. 1953); *Ginsberg* v. *Stern*, 263 F.2d 457 (3rd Cir. 1959)), and, *second*, that no motion to set aside, alter or amend the judgment of dismissal having been made within one year following its entry, the trial court is without power to disturb the judgment of its own motion or on motion of any party because of the limitation contained in Rule 60 (b) of the Federal Rules of Civil Procedure (*Sharlot* v. *Ford Motor Co.*, 7 F.R.D. 155 (E.D. N.Y. 1945); *McGinn* v. *United States*, 2 F.R.D. 562 (D. Mass. 1942); *Young* v. *Garrett*, 5 F.R.D. 117 (W.D. Ark. 1946); *Woods* v. *Severson*, 9 F.R.D. 84 (D. Neb. 1949)).

In support of its position defendant relies on the decision in *Young* v. *Garrett*, 5 F.R.D. 117 (W.D. Ark. 1946), which was affirmed by the Court of Appeals for the Eighth Circuit (159 F.2d 634 (8th Cir. 1947)). That case involved a situation in which the District Court had previously granted a motion to dismiss. The plaintiffs appealed and the order of dismissal was affirmed. Plaintiffs then applied for a rehearing in the Court of Appeals or in the alternative for a remand to allow them to amend their complaint. The Court of Appeals denied the petition for rehearing but directed (5 F.R.D., 119-20):

"* * * 'that the case be remanded to the District Court with instructions to permit the appellant (plaintiff in Civil Action No. 163 and plaintiffs in Civil Action No. 164) to apply to that court for leave to amend his complaint, if he so elects, for the purpose of stating jurisdiction, if possible (see, International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8 Cir., 121 F.2d 561, and Rule 15, Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c), provided that such application be made within a reasonable time and not later than October 1, 1945; and for such further proceedings as are not inconsistent with the opinion of this court.'"

Thereafter plaintiffs applied to the District Court for leave to amend and the District Judge held that despite the instructions from the Court of Appeals he had no power to permit the amendment. Plaintiffs appealed and the Court of Appeals affirmed.

In subsequent litigation between the same parties the Supreme Court of Arkansas had occasion to summarize the proceedings in the Federal courts, *Young* v. *Garrett*, 208 S.W.2d 189 (1948). It stated (p. 192):

"When the Court of Appeals refused to grant a rehearing and affirmed Judge Miller's order of dismissal, it appears to have attempted to confer upon the trial court a power subsequently found to be nonexistent. That is the effect of Judge Miller's holding, and on appeal for the second time in these cases he was not reversed. So, in effect, rights of the parties to maintain their suits in Federal Court were settled by the appellate court August 8, 1945, and under Rule 60 (b) the judgment was a finality. * * *"

The situation in *Young* v. *Garrett*, *supra*, is strikingly similar to that which now confronts this Court. Consequently, the argument of the defendant is most persuasive and there appears to be considerable merit in this conten-

tion. However, since plaintiffs' motion to file a second amended complaint must be dismissed on the merits for the reasons hereinafter set forth, it is not necessary for the Court to pass upon this question.

The Proposed Second Amended Complaint

In Count I of their first amended complaint plaintiffs attempted to state in 96 paragraphs a claim under Section 3 of the Clayton Act. Their proposed second amended complaint, which is limited to a single count, attempts to state precisely the same claim in 41 paragraphs. Paragraphs 1 to 21, inclusive, and paragraphs 26 to 40, inclusive, are for all practical purposes verbatim copies of paragraphs taken from the first amended compaint or the summary of portions of the first amended complaint contained in the statement of facts in plaintiffs' brief on appeal. In paragraphs 22, 23, 24 and 25, plaintiffs have attempted to summarize in general terms cast in statutory language the conclusions which they draw from some sixty paragraphs of the first amended complaint which relate to the course of dealing between the parties. Paragraph 41 merely states the amount of damage claimed by each plaintiff.

The Court of Appeals in the first nine paragraphs of its opinion summarized the allegations of the first amended complaint. Except with respect to the damages claimed, that summary is equally applicable to the proposed second amended complaint. It omits no operative fact that may be considered well pleaded in the second amended complaint. Consequently no useful purpose would be served by including herein a summary of the proposed second amended complaint. Suffice it to say that it contains no allegations of operative facts which were not pleaded in the first amended complaint.

When, after a motion to dismiss has been granted because the complaint fails to state a claim, application is made to the court for leave to file an amended complaint, leave should be refused if the proposed amendments do not state new facts but merely rephrase the original allegations. The precise question was before the Court of Appeals for this Circuit in *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944). There the District Court, after granting a motion to dismiss on the ground that the complaint failed to state a valid claim, denied plaintiffs leave to file an amended complaint. The Court of Appeals in affirming the District Court's ruling said (p. 149):

> "As to the third question, we are not unmindful of the attempted distinction between the substance of the amendment and the general allegations of the original complaint so strongly stressed by counsel in argument, but we believe that counsel have attempted to emphasize words rather than substance. Under the liberality of the Federal Rules of Civil Procedure, we think that these allegations could have been proved under paragraph 8 of the original complaint. We think, further, that the suggested amendment failed to state a valid claim against the appellees."

The rule applied in the foregoing case is concisely stated in *Kirsch* v. *Barnes*, 157 F. Supp. 671 (N.D. Cal. 1957), aff'd 263 F.2d 692 (9th Cir. 1959), where the court, after granting a motion to dismiss the original complaint, denied a motion for leave to file an amended complaint, saying (157 F. Supp. 672):

> "• • • the Court is given a large measure of discretion under such circumstances, and leave to file an amended complaint should not properly be granted unless new facts are made to appear which would remedy the defects contained in the previous complaint (Ginsburg v. Stern, D.C.W.D. Pa., 19 F.R.D. 238,

241; and cf. Sidebotham v. Robison, 9 Cir., 216 F.2d 816, 821. * * * "

The failure of plaintiffs to plead new operative facts curing the defects found to exist in the first amended complaint is sufficient grounds to deny leave to file the proposed second amended complaint. However, independent of the conclusions reached with respect to the first amended complaint it does not appear that the proposed second amended complaint states a claim under Section 3 of the Clayton Act.

Failure to State a Claim under Section 3 of the Clayton Act

As pointed out by the Court of Appeals, the gravamen of the offense defined in Section 3 of the Clayton Act is the forbidden condition, agreement or understanding of exclusivity. It must be pleaded in order to state a claim and, as the Court said "an obligation devolves on the pleader to set out clearly and unambiguously the operative facts upon which he relies."

Plaintiffs insist that paragraphs 22, 23, 24 and 25 of the proposed second amended complaint cure the fatal defect found by the Court of Appeals to exist in the previous complaint. In paragraph 22 plaintiffs allege that commencing in 1950, the defendant entered into an overall scheme to compel Associate Stores to discontinue outside purchases by using (a) sales made on condition that the Associate Stores would not deal in the goods of another and (b) tie-in arrangements.

Paragraph 23 alleges that every few months defendant's representatives would call on Associate Stores and if they saw that the Associate Store was carrying "outside merchandise on the forbidden list" they would refuse to sell it "desirable lines" unless it agreed not to deal in the

goods of defendant's competitors in the future. It is then alleged "in order to get the particular order accepted the Associate Stores agreed to such terms, under duress, and actually made executed transactions with the defendant on the condition that they would not deal in or carry lines competitive with defendant."

Paragraph 24 dilutes paragraph 23 somewhat by alleging that defendant's representatives on occasion only demanded that the Associate Store limit the quantity of its purchases of so-called forbidden outside items.

Paragraph 25 purports to describe the tie-in arrangement which was alleged in paragraph 22 as being the second device used by defendant. The relevant portion of the description is contained in the following sentence: "The defendant's representatives noting that a particular store, either was not carrying a certain item, or if it did carry such an item, only in token quantities, would tie the sale of desirable items, such as Davis batteries and other auto accessories, to other undesirable lines such as Truetone sets and Wizard white goods."

As heretofore stated, the foregoing paragraphs represent an attempt to allege in general terms that which was pleaded in great detail in the first amended complaint. To that extent this case presents the converse of the situation involved in *Ledbetter* v. *Farmers Bank and Trust Co.*, *supra*, in which the Court of Appeals for this Circuit upheld the refusal to permit the filing of an amended petition which pleaded in detail that which had been alleged generally in a petition previously held insufficient. Furthermore the paragraphs in question are replete with conclusions of the pleader. The sufficiency of the complaint must be tested on the basis of well pleaded facts and the Court cannot consider conclusions of law, or conclusions of fact not supported by allegations of specific facts. *Smith*

v. *Carter Oil Co.*, 104 F. Supp. 463 (W.D. La. 1952); *Weeks* v. *Denver Tramway Co.*, 108 F.2d 509 (10th Cir. 1939); *United States* v. *Starlite Drive-In, Inc.*, 204 F.2d 419 (7th Cir. 1953).

In any event, the conclusions contained in the paragraphs relied on by plaintiffs must be read in conjunction with the specific allegations in other paragraphs which refute the validity of those conclusions. Each of the plaintiff-retailers alleges that his franchise was cancelled because he refused to abide by defendant's policy against the handling of outside merchandise. In paragraph 19 of the proposed second amended complaint it is stated that defendant did not at any time tell the Associate Stores in a forthright manner that they would have to convert their stores into exclusive Western Auto stores or have their franchises cancelled, but attempted to accomplish that result in a surreptitious manner. In paragraph 20, it is alleged that defendant's representatives "orally announced to plaintiff-retailers and other Associated Stores that henceforth they should not sell 'outside' seat covers. As time passed, other outside products, particularly Sylvania television sets were added to the list of those that could not be handled by defendant's Associate Stores on pain of loss of franchise." Paragraphs 26 and 27 allege:

> "Some of the Plaintiff-Retailers discontinued outside buying for long periods of time and bought exclusively from the Defendant in order to placate Defendant's representatives even though such practices were against their wishes and desires. Others were forced to buy merchandise they did not need and could not sell in order to be able to purchase readily salable items.
>
> "Because of the great economic loss of all of the Plaintiff-Retailers between the years 1950-55, they began to stiffen their attitude toward the pressure be-

> ing placed upon them. Thus, commencing in 1955, with respect to all of the Plaintiff-Retailers, the Defendant's representatives began to change their tactics and started to actually enforce the Defendant's threats of cancellation."

Plaintiffs have done precisely what they did in their previous complaint. The proposed second amended complaint contains affirmative allegations showing that from time to time plaintiffs were subjected to pressure to refrain from dealing in outside merchandise. At times they bowed to that pressure and curtailed their purchases of outside merchandise. Nevertheless, they did continue to deal in outside merchandise and for that reason their franchises were finally cancelled. As the Court of Appeals said (269 F.2d at 338):

> "In short, plaintiffs' own statement of claim not only fails directly to allege but actually tends to negate any condition, agreement or understanding that plaintiffs shall not use or deal in the goods, wares or merchandise of a competitor of Western Auto."

One further objection to the proposed second amended complaint should be noted. Under Section 3 of the Clayton Act it is essential that a complaint contain allegations sufficient to show that the effect of the forbidden condition, agreement or understanding "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." This Court ruled with respect to the first amended complaint that no facts were alleged which demonstrated the possible effect of substantially lessening competition or creating a monopoly. Plaintiffs have made no effort in their proposed second amended complaint to cure this defect. In fact, the only allegations having any relevance to this subject are copied verbatim from the first amended complaint and are stated as conclusions

in the language of the statute. No facts are alleged which indicate the extent of competition in any line of commerce in any relevant market. The most that can be said for the proposed complaint is that it charges that defendant's activities have tended to restrict the sale of outside merchandise by the one Western Auto store located in each of six rural communities. That does not demonstrate any tendency to lessen competition substantially or create a monoply in any line of commerce.

In so far as other contentions advanced by the parties need be noted, they are covered adequately by the opinions heretofore filed by this Court and the Court of Appeals. Since it appears that the proposed second amended complaint does not state a claim for violation of Section 3 of the Clayton Act, plaintiffs' motion for leave to amend should be denied. *Stephens* v. *Reed*, 121 F.2d 696 (3rd Cir. 1941); *Dayton* v. *Gillilland*, 242 F.2d 227 (D.C. App. 1957); *DeLuca* v. *Atlantic Refining Co.*, 176 F.2d 421 (2nd Cir. 1949).

Conclusion

Plaintiffs' motion for leave to file their proposed second amended complaint is hereby overruled and this cause is dismissed.

Ashton H. Williams,
United States District Judge.

April 11th, 1960.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7813.

McElhenney Co., Inc., W. F. Snipes, George Toole, Mac Toole, R. P. Swofford, Charles L. Gasque and Harry Clinkscales,
Appellants,

versus

Western Auto Supply Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG.
ASHTON H. WILLIAMS, DISTRICT JUDGE.

(Argued March 18, 1959. Decided July 16, 1959.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Chester D. Ward, Jr., for Appellants, and James C. Wilson and Alfred F. Burgess (Carl E. Enggas; Colvin A. Peterson, Jr.; Wyche, Burgess & Wyche, and Watson, Ess, Marshall & Enggas on brief) for Appellee.

SOBELOFF, Chief Judge:

A suit claiming various sums aggregating $2,241,000 as treble damages was brought against the Western Auto

Supply Company charging it with having violated Section 3 of the Clayton Act,[1] 15 U.S.C.A. 14, and Section 2 of the Sherman Act,[2] 15 U.S.C.A. 2.

The five individual plaintiffs are the owners of five stores in South Carolina and one in Georgia which in the past served as retail outlets for Western Auto merchandise, and the sixth plaintiff, McElhenny Co., Inc., is the former South Carolina distributor for Sylvania television sets who from time to time had made sales to the plaintiff-retailers. Western Auto is a nationwide distributor of products for automobile and home. Among the items which it sells are sporting goods, toys, electrical appliances, power and hand tools, lawn and garden equipment, radio and

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1. Section 3 of the Clayton Act.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3; 38 Stat. 731.

2. Section 2 of the Sherman Act.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." July 2, 1890, c. 647, § 2, 26 Stat. 209. As amended July 7, 1955, c. 28, 69 Stat. 282.

television sets, and, as its name suggests, automobile supplies.

The amended complaint is quite long, containing over one hundred numbered paragraphs, dealing with defendant's actions in regard to each of the six plaintiffs. In essence, they allege that during varying periods prior to 1956, Western Auto threatened to stop selling to the plaintiff-retailers if they would continue to handle goods in competition with Western Auto lines, and that ultimately Western Auto carried out this threat and discontinued doing business with the plaintiff-retailers who did not abide by the defendant's wishes.

The District Court entered an order sustaining Western Auto's motion to dismiss on the ground that the amended complaint failed to state a claim for which relief could be granted. This is an appeal from that order.[3]

Instead of making its merchandise available through a larger number of its own retail stores, or in hardware stores generally, Western Auto has in practice restricted its outlets to a network of some 350 company-owned stores and approximately 3600 independently owned and operated "associate" stores. The company-owned stores are generally located in the larger cities, while the "associate" stores are found in smaller communities. As of December 31, 1956, Western Auto had seven company-owned and ninety-one associate stores in South Carolina.

The contracts which Western Auto enters into with its associated stores authorize them to use the name "Western Auto Associate Store." This is considered a valuable right because of the good will which the Western Auto

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3. Since we are reviewing an order sustaining the defendant's motion to dismiss, the recitals of the complaint which were well pleaded are treated as facts.

Supply Company has developed. The contracts are cancellable at will by either party upon sixty days written notice. Each contract requires only that the associate shall purchase a stipulated amount of merchandise for an opening stock. Nothing in the contract itself prohibits the purchase and sale of items from other sources, and there is no provision for minimum purchases from Western Auto after the opening order.

Beginning in 1950, however, Western Auto's representatives, it is alleged, began to coerce certain of the associate stores in South Carolina and Georgia, including the plaintiff-retailers, to discontinue the sale of merchandise supplied by competitors. The announcement was made that associate stores should not sell "outside" seat covers, television sets and certain other products. From 1950 to 1956, Western Auto's representatives continually threatened to cancel the franchises of dealers who did not handle Western Auto's "Wizard" seat covers and its "Truetone" television sets. The principal controversy appears to have been over television sets; pressure was applied to some of the plaintiff-retailers to give up selling all competing television sets, while others were told to restrict their handling of outside sets.

The plaintiff-retailers refused to accede fully to Western Auto's demands because they had found that outside television sets, particularly Sylvania sets, sold better than Western Auto's Truetone models. They did, however, limit their outside purchases to a degree in order to retain their franchises which were considered valuable because of Western Auto's other lines. As a result, the plaintiff-retailers purchased some Western Auto merchandise they did not want and otherwise would not have purchased. Notwithstanding these additional purchases from the defendant, the franchises of these associates were eventually

cancelled because of their refusal to respect Western Auto's distribution policies.

In their complaint, the plaintiff-retailers claimed damages for losses said to have resulted from pressure applied by representatives of Western Auto during the period prior to the cancellation of their franchises. In particular they charged that they (1) lost profits because of their inability to sell outside merchandise unfettered by defendant's pressures, (2) lost profits as a result of being forced to stock and sell defendant's inferior products, and (3) lost cash discounts and freight allowances which would have been available from outside wholesalers.[4] The retailers also sought damages for (4) the ultimate cancellation of their contracts which was said to have resulted in (a) loss of good will and value attaching to their Western Auto franchises, and (b) loss of anticipated profits in the reasonable future. The plaintiff McElhenney Co., Inc., the former Sylvania distributor, claimed to have been damaged by the restrictions Western imposed upon its customers, as a result of which McElhenney's market among such customers for television sets, and replacement parts which it also handled, was materially reduced.

Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts

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4. Certain of the plaintiff-retailers also claimed damages resulting from the closing of their stores which they attributed to the defendant's restrictive policies. All of the plaintiff-retailers are still in business. All those who closed their stores have opened new ones. Snipes who owned two stores has closed one of them, but continues to operate the other. Two of the plaintiff-retailers are now affiliated with Firestone.

have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege, the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

This is not to say, however, that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding. But whether there is such agreement is always a question of fact to be determined in light of all the circumstances when the case on a properly pleaded complaint is brought to trial (Cf. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919); *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U.S. 208 (1921)). To support a right of action for treble damages, the challenged agreement must be violative of one of the provisions of the several antitrust laws. Here the claim is that the defendant infringed Section 3 of the Clayton Act and Section 2 of the Sherman Act.

Section 3 of the Clayton Act

In essence Section 3 of the Clayton Act prohibits leases, sales or contracts for the sale of goods and commodities made on the condition, agreement or understanding that the purchaser shall not use or deal in the goods and commodities of the seller's competitors where the effect may be to substantially lessen competition or tend to create a monopoly. This section, like others of the Clayton Act, was intended to reach specific conduct which had been held by the courts to be outside the ambit of the Sherman Act and which the Congress felt must be pro-

scribed in order to promote competition. The Congressional history, 51 Cong. Rec. 9161, indicates that while Congress was aware of other business practices which might also be harmful to the economy, it was attempting to outlaw only those with which the section expressly dealt.

Neither in terms nor inferentially does the statute prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this: *Nelson Radio and Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5 Cir., 1952), cert. den., 345 U.S. 925 (1953); *Leo J. Meyberg* v. *Eureka Williams Corp.*, 215 F.2d 100 (9 Cir., 1954), cert. den. 348 U.S. 875 (1954); *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429 (M.D. Pa., 1945), affirmed 115 F.2d 99 (3 Cir., 1946); *Allied Equipment Co.* v. *Weber Engineered Products*, 237 F.2d 879 (4 Cir., 1956).

Appellants incorrectly interpret the ruling of the court below as limiting the reach of Section 3 to those instances where exclusive dealing is brought about by contract expressly imposing a "legal" obligation on the part of the buyer not to handle the goods of others. The District Court's opinion will not sustain this reading. The court was differentiating between an agreement of exclusivity on the one hand, and a naked refusal to deal on the other. It did not suggest that the illegal condition, agreement or understanding may not be implied from a course of dealing between the parties. Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal

contract may be inferred from all of the circumstances. Admittedly, the written agreement between the parties contains no provision requiring the franchisees to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found. This the trial judge fully understood.

We have carefully examined the facts and circumstances upon which the plaintiffs predicate their claim of contravention of Section 3 through an implied understanding or course of dealing. There is no dispute about the fact that it was Western Auto's policy to have its associated retail stores push its own products and that it frowned upon their handling of competing goods. Plainly enough Western Auto wanted its dealers to advance sales of its merchandise, and threatened with cancellation and actually cancelled dealers who patronized its competitors to an extent which it felt jeopardized the value to it of the franchises issued to associated stores. But so far as the complaint shows it exacted no agreement against the handling of competing merchandise. The complaint itself makes clear that the plaintiffs during the period when the asserted understanding was in effect actually handled competitive articles. While the plaintiffs in their brief and in oral argument earnestly contended that Western Auto compelled franchised retailers to handle its full line of products, we find no clear cut allegation in the complaint that this was pursuant to a condition, agreement or understanding violative of the Clayton Act. This omission is sharply pointed up by the paragraphs relating to the individual plaintiffs, which disclose that they did not buy the defendant's full line and, indeed, supplemented Western's products with goods obtained from other sources

In short, plaintiffs' own statement of claim not only fails directly to allege but actually tends to negate any condition, agreement or understanding that plaintiffs shall not use or deal in the goods, wares or merchandise of a competitor of Western Auto.

The gravamen of a Section 3 violation is the forbidden condition, agreement or understanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference whether this is voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened or whether there is any tendency toward monopoly. Cf. *Standard Oil Company* v. *United States*, 337 U.S. 293 (1949); *Dictograph Products* v. *Federal Trade Commission*, 217 F.2d 821 (2 Cir., 1954). A wide latitude would be afforded plaintiffs at a trial to prove their claim through direct or circumstantial proof. Whether the proof would support a finding of implied agreement, or understanding is a question which we do not reach in the present posture of the case.

We agree with the District Court that an obligation devolves upon the pleader to set out clearly and unambiguously the operative facts upon which he relies. Repeatedly the plaintiffs' brief asserts that their complaint contains express and "implied allegations" sufficient to meet the requirements of the statute. It is not too much even under the liberal rules of pleading to require that the allegations be expressed in plain language, without such complete reliance as we have here upon mere implication. The complaint has been once amended, and apparently there was no application for further amendment. Under the circumstances, we might appropriately affirm without affording

the plaintiffs any additional opportunity to plead over. However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreement or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U.S. 445 (1957). Should there be a reformulation of the complaint the customary pretrial procedures may still be availed of by the defendant to lay bare any deficiency in the plaintiffs' case.

Section 2 of the Sherman Act.

We agree with the District Court that the pleading is equally deficient in framing a violation of Section 2 of the Sherman Act. As we have seen, the plaintiffs have failed to meet the less exacting requirements of the Clayton Act; nevertheless they would have the Court accept the same essential facts as a statement of a case under Section 2 of the Sherman Act. Their argument on this count is not that the defendant attempted to monopolize commerce in any particular product, but rather that it attempted to monopolize what they denominated "a method of doing business" by having its goods sold exclusively in the only stores in certain towns carrying a complete line of automobile and home supplies. It is not charged that these items were unavailable in other stores in each of the named towns, but simply that all of them could not be purchased in any other single store. Such charges do not amount to a requisite allegation of monopolization or at-

tempt to monopolize which Section 2 of the Sherman Act condemns.

This count of the complaint thus is bereft of any averment of monopoly power in any defined market, or an intent to monopolize coupled with a dangerous possibility that a monopoly could be effectuated, or the improper employment of the defendant's position to attain ends forbidden by law. *Lorain Journal* v. *United States*, 342 U.S. 143, 153 (1951); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905). All that the plaintiffs have done is to apply the Sherman law label to the same facts which they charge constitute a Clayton Act transgression. While we doubt that they could replead effectively, nevertheless should the District Court see fit to permit a further amendment of the first count of the complaint, it may be disposed to allow a like opportunity in respect of the Sherman Act count as well.

While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.

Affirmed and remanded.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Filed November 18, 1958. Miller C. Foster, Jr., Clerk.

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE and HARRY CLINKSCALES,
Plaintiffs,

v.

WESTERN AUTO SUPPLY COMPANY,
Defendant.

ORDER

Defendant has moved to dismiss the amended complaint on the ground that it fails to state claims upon which relief can be granted. The amended complaint seeks treble damages for alleged violations of Section 2 of the Sherman Act (15 U.S.C.A. 2) and Section 3 of the Clayton Act (15 U.S.C.A. 14) as authorized by Section 4 of the Clayton Act (15 U.S.C.A. 15).

The Parties

The defendant Western Auto Supply Company is engaged in the business of selling tires, tubes, batteries, auto accessories, sporting goods, home appliances, etc., at retail through some 350 company-owned stores and at wholesale to some 3600 Associate Stores located throughout the United States. As of December 31, 1956, it operated seven company-owned stores and had 91 Associate Stores in South Carolina.

The plaintiffs, except McElhenney Co., Inc., were, prior to 1954, five owners and operators of their respective Associate Stores in various towns in South Carolina. Each alleges that at various dates between 1954 and 1956, his franchise from the defendant was cancelled but that he continued to operate either independently or by an affiliation with Firestone. Plaintiff McElhenney Co., Inc., from February, 1954 to October, 1956, had the exclusive franchise for the distribution at wholesale of Sylvania radio and television sets and parts in South Carolina.

The Allegations of the Amended Complaint

The amended complaint alleges that the defendant did business with its Associate Stores, including the former dealers suing as plaintiffs herein, by means of a franchise. The Associate Store franchise is a vendor-purchaser contract by which defendant Western grants to the Associate the right to use the *name "Western* Auto Associate Store" in conjunction with the proprietor's name and agrees that it will sell the Associate merchandise on the same terms as all other Associate Stores. The Associate retains ownership, management and control of his store and only agrees under certain conditions to buy a stated amount of merchandise from Western for the opening stock of his store. The franchise is terminable by either party at any time on 60 days' written notice. Nothing in the franchise requires the Associate to deal exclusively with Western.

Plaintiff-retailers contend that their franchises were cancelled because they insisted upon purchasing some items of "outside" merchandise, *i. e.*, merchandise not distributed by defendant. Plaintiff McElhenney, the former Sylvania distributor, asserts that defendant's alleged policy against its Associate Stores handling "outside" merchandise curtailed its sales of Sylvania products to Western

Auto Associate Stores in South Carolina, all to its loss and damage.

Plaintiffs' contentions are that the above alleged facts manifest an unlawful exclusive dealing arrangement in violation of Section 3 of the Clayton Act and an unlawful attempt to monopolize or monopolication in violation of Section 2 of the Sherman Act. Defendant, on the other hand, contends that the above allegations manifest no more than the exercise of the defendant's legal right to terminate the franchises of dealers who it deems do not adequately represent it. Judgment is sought by plaintiffs in the amount of $2,241,000 and costs and a reasonable attorney's fee.

Discussion

It is fundamental that the purpose for the enactment of the federal antitrust laws, including the Sherman and Clayton Acts, was to protect the public interest from the evils of monopolies and unreasonable restraints of trade in interstate commerce. *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165 (1915). Accordingly, to recover in a private antitrust suit the plaintiff must allege facts from which it can be determined that there has been a violation of the antitrust laws together with damage to the plaintiff as a consequence of such violation. *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir., 1934); *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D.C. Md., 1956), affirmed 239 F.2d 176 (4th Cir., 1956); *Nelligan* v. *Ford Motor Company*, 161 F. Supp. 738 (D.C. S.C., 1958). See also *Shotkin* v. *General Electric Co.*, 171 F.2d 236 (10th Cir., 1948); *Feddersen Motors* v. *Ward*, 180 F.2d 519 (10th Cir., 1950); *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D.C. Md., 1937); *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447 (N.D. Ill., 1947)

If the amended complaint herein does not allege facts from which it can be ascertained that the defendant has violated the antitrust laws with injury to the plaintiffs, defendant's motion to dismiss must be sustained.

Section 3 of the Clayton Act

Section 3 of the Clayton Act, 15 U.S.C.A. 14, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The amended complaint contains no allegations that the defendant actually leased, sold or contracted to sell any goods, wares, merchandise, machinery, supplies or other commodities on the condition, agreement or understanding that the plaintiffs or anyone else should not use or deal in the goods of a competitor of the defendant.

The plaintiffs contend that the defendant terminated the franchises of the retailer-plaintiffs on account of their handling of products not approved by the defendant and

that this "course of dealing" constitutes a violation of Section 3 of the Clayton Act. The defendant contends that nothing more is involved than a permissible refusal to deal by a single trader acting unilaterally and not in concert with any competitor or anyone else, pursuant to the right reserved to it in its franchise agreements and in the exercise of its sound business judgment.

In *Nelson Radio and Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir., 1952), cert. den. 345 U.S. 925 (1953), a closely parallel situation was presented. There the plaintiff, a wholesaler of communications equipment, alleged that it had distributed defendant's products for several years prior to February 10, 1949. The contract under which the plaintiff operated contained a specific termination date but it also provided that it continued after that date subject to termination by written notice of either party. Prior to January 2, 1948, the defendant submitted to the plaintiff an agreement for the year 1948, and at the same time informed the plaintiff that it could not sell communications equipment manufactured by defendant's competitors. The plaintiff alleged that it signed the 1948 contract under coercion and further that during the period November, 1947 - February 10, 1949, the defendant notified it that it was not permitted to sell competing products. In November and December, 1948, the parties sought to renew the 1948 agreement but the plaintiff insisted on the right to sell products manufactured by others than the defendant. The defendant resisted and the plaintiff's franchise was cancelled effective February 10, 1949. Holding these allegations to be insufficient to state a violation of Section 3 of the Clayton Act and affirming the dismissal of the complaint, the court said (pp. 915-16):

> "Section 3 of the Clayton Act, by its express terms, covers only leases, sales or contracts actually

made on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller. There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself [citations]. For that matter, a review of all of the cases decided by the Supreme Court involving Section 3 of the Clayton Act, reveals that in each of them there was an agreement and not a mere refusal to deal. There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another. The plaintiff has not been injured as the result of a contract, either express or implied, which sought to prevent him from dealing in the goods of any competitor of the defendant.

"The judgment of the District Court dismissing the amended complaint was right and it is hereby affirmed."

The *Motorola* case was followed by *Leo J. Meyberg* v. *Eureka Williams Corp.*, 215 F.2d 100 (9th Cir., 1954), cert. den. 348 U.S. 875 (1954). This was also an action under Section 3 of the Clayton Act charging that the defendant refused to continue business relations with the plaintiff because the latter insisted upon handling competing products. According to the allegations of the amended complaint in that case, the plaintiff was engaged in the wholesale distribution of electric vacuum cleaners, including the defendant's Eureka brand. In 1952, the defendant notified the plaintiff that unless the plaintiff ceased handling a competing line of cleaners, the Hoover brand, the defendant would cancel all business relations with the plaintiff, stating that "Hoover factory rebuilt cleaners at

their special sale prices and Eurekas just can't live together in the same house any longer * * *." The District Court dismissed the complaint for failure to state a claim and the Court of Appeals affirmed, stating (p. 100):

> "The complaint herein alleges a violation of § 3 of the Clayton Act, 15 U.S.C.A., § 14, by reason of the refusal of appellee to continue business relations with appellant unless appellant would agree to deal exclusively in the product of appellee. That section of the Clayton Act makes it unlawful to enter into any lease, sale, or contract conditioned upon the lessee or purchaser not dealing in the goods of a competitor, where the effect of such lease, sale or contract may be to substantially lessen competition or create monopoly. The contract (of 1944) previously existing between the parties was, by its terms, terminable at will, and contained no provision violative of § 3 of the Clayton Act. In July, 1952, appellee terminated the contract by telegram for the reason heretofore stated, because appellant was continuing to deal in the product of a competitor of appellee.
>
> "Prior to July, 1952, the contract between the parties did not forbid appellant to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said § 3 by entering into an illegal lease, sale or contract.
>
> "The judgment of the district court dismissing this case must therefore be, and it hereby is, affirmed."

The Court of Appeals for this Circuit has recently pointed out that the proscriptions of Section 3 are specific and prohibit only leases, sales or contracts for sales based on the condition that purchaser or lessee not deal in the goods of the competitor. *Allied Equipment Co.* v. *Weber Engineered Products*, 237 F.2d 879 (4th Cir., 1956). The court there states (p. 883):

"The final question involves Allied's claim for treble damages arising out of Weber's alleged breach of the antitrust laws. It is Allied's contention that Weber, by attempting to use the threat of cancellation to force Allied to enter into an illegal exclusive-dealing contract, engaged in unfair competition which was the proximate cause of pecuniary damage to Allied. Under Section 3 of the Clayton Act, upon which this claim is based, it is unlawful to enter into any lease, sale or contract which is conditioned upon the lessee's or purchaser's not dealing in the goods of a competitor, where the effect of such lease, sale or contract may be substantially to lessen competition or to create a monopoly. There can be no violation of the Act unless there is a contract, sale or lease.

"Allied faces a dilemma on the point. If there was no contract denying it the right to handle products competitive to Weber, there was no violation of the antitrust laws. If there was such a contract, as we have already pointed out the breach was by Allied and so no damages accrued to it."

Accord: *Cole* v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir., 1954); *Hunter Douglas Corp.* v. *Lando Products*, 215 F.2d 372 (9th Cir., 1954); *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (5th Cir., 1954).

Refusals to deal and the right of customer selection on the part of a single trader have been upheld by the courts even though the refusal was prompted by the motive of securing exclusive dealers. *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429 (M.D. Pa., 1945), affirmed 155 F.2d 99 (3rd Cir., 1946); *Camfield Mfg. Co.* v. *McGraw Elec. Co.*, 70 F. Supp. 477 (D.C. Del. 1947); *Dublin Distributors* v. *Edward and John Burke, Ltd.*, 109 F. Supp. 125 (S.D. N.Y. 1952). See also *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919); *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *Great Atlantic & Pacific Tea Co.* v. *Cream of*

Wheat Co., 227 Fed. 46 (2nd Cir. 1915). Nor can it make any difference that complaint is also made by a distributor of competing products as well as by disenfranchised dealers. *Camfield Mfg. Co.* v. *McGraw Electric Co., supra.*

The antitrust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's products and a manufacturer or distributor is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor. Under these circumstances Western was within its legal rights in discontinuing business relations with the plaintiff-retailers herein and announcing in advance the terms upon which it would continue to do business with them.

. . The basic fallacy inherent in plaintiffs' contention is that so long as they handled "outside" merchandise while keeping a franchise from the defendant they were permitted to handle such merchandise. When they ceased to have a franchise from the defendant it is quite apparent they could have been under no restriction imposed by the defendant. There is a fundamental difference between refusing to deal with a customer or potential customer and prohibiting that customer by contract from dealing with another. As long as the customer has a choice between dealing with his immediate supplier and dealing with others he may act of his own free will. If his immediate supplier determines that for reasons known only to himself, whether they be because of inadequate representation, unsatisfactory relationships, or others, he may terminate the relationship, then the dealer is free to deal with all other suppliers. It follows that at no point has there been a contract or agreement which prohibits the purchaser from dealing in the goods of another.

In the present case the amended complaint makes it clear that the defendant imposed no legal obligation on plaintiff-retailers to refrain from handling "outside" merchandise. It seems that the defendant objected to its Associate dealers handling a few articles of competitive merchandise which were also offered to them by defendant. However, defendant had afforded the plaintiff-retailers the benefit of its name and national advertising. It is not strange that defendant was unwilling to share its benefits with manufacturers and wholesalers of brands not handled by the defendant. Consequently, there is no inference to be drawn from defendants's urging upon the plaintiff-retailers that they restrict their operations to whatever extent possible to handling the goods and merchandise of defendant.

The cases relied upon by plaintiffs, *United States* v. *Richfield Oil Co.*, 99 F. Supp. 280 (S.D. Cal. 1951), aff'd *per curiam* 343 U.S. 922 (1952), and *Carter Carburetor Corp.* v. *Federal Trade Commission*, 112 F.2d 722 (8th Cir. 1950), are clearly distinguishable. *Richfield*, *supra*, was a companion case to *United States* v. *Standard Oil Co. of Cal.*, 78 F. Supp. 850 (S.D. Cal. 1948), aff'd 337 U.S. 293 (1949), and involved essentially the same question of the validity of requirements contracts under both Section 1 of the Sherman Act and Section 3 of the Clayton Act. The only type of agreement in the *Richfield* case not previously adjudicated in the *Standard Stations* case involved L-O Stations and as to these Richfield expressly admitted that it had agreements with the station operators requiring them to deal exclusively in Richfield products, its defense to this arrangement being that the operators were agents or employees of Richfield and consequently the arrangement was not within the purview of Section 3 of the Clayton Act. This defense was not sustained and the agreements were held illegal.

The *Carter Carburetor* case, *supra*, dealt with a situation wherein the defendant attempted the total destruction of a specific competitor by the use of preferential discounts which made the handling of the defendant's products unprofitable to non-exclusive dealers. This was a patent violation of Section 3 because discounts and rebates are specifically prohibited by the statute.

Plaintiffs further suggest that the amended complaint may be sustained under Section 3 of the Clayton Act with reference to the doctrine of the "tying" cases, taking the position that the defendant tied the sale of its allegedly "readily salable" items such as its tires and batteries, to the sale of its allegedly less popular items such as its appliances. Plaintiffs, however, have singularly failed to allege the existence of any tying agreement and the essentials of a tying contract are not present herein. See *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F.2d 952 (1st Cir. 1945); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *Nelligan* v. *Ford Motor Co.*, 161 F. Supp. 738 (W.D.S.C. 1958).

The amended complaint is further deficient in that plaintiffs have not demonstrated any adverse effect upon interstate commerce. Section 3 of the Clayton Act requires that the prohibited contract, sale or lease have the potential effect to "substantially lessen competition or tend to create a monopoly * * *." No facts are alleged to demonstrate such a possible effect.

The gist of plaintiffs' grievances is merely that the defendant, for reasons sufficient to itself, exercised its undoubted and reserved right to terminate the franchises of the plaintiff-retailers. This is purely a private controversy and one not cognizable under Section 3 of the Clayton Act.

The amended complaint does not allege a violation of Section 3 of the Clayton Act.

Section 2 of the Sherman Act.

Section 2 of the Sherman Act provides as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Paragraph 3 of the second count of plaintiffs' amended complaint alleges that the defendant engaged in a "scheme and plan by which defendant intended to monopolize or attempt[ed] to monopolize certain lines of trade in interstate commerce." Paragraph 19 of the amended complaint defines the market involved as "the sale and distribution of [defendant's] various products manufactured by it • • •." Defendant in reality is charged with monopolizing or attempting to monopolize the market for its own products. But every manufacturer has a monopoly on its own brand name and such natural monopoly does not violate Section 2 of the Sherman Act. The principle is well stated by Judge Chesnut in *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C. Md. 1937), where he said (p. 828):

> "• • • Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his private brands, and no private controversy with a distributor could legally tend to increase that type of a natural monopoly. The Sherman Act is, therefore, clearly not really involved."

The Supreme Court had recent occasion to pass upon the same question in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), where duPont pro-

duced approximately 75% of all cellophane manufactured in the United States. This was held not to violate the antitrust laws because cellophane competed with other flexible wrapping materials and duPont did not possess market control over the entire market involved. The court said (p. 393):

> "* * * Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However this power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

Accord: *Packard Motor Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir. 1957); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 902 (D.C. Md. 1956), aff'd 239 F.2d 176 (4th Cir. 1956).

There is no allegation in the amended complaint that the defendant monopolizes the home and auto supply business in any relevant market. The most that can be said is that plaintiffs allege that the defendant is "dominant" in that field. This is not sufficient, for dominance is not the equivalent of monopoly power. *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 346 (S.D. N.Y. 1950); *United States* v. *duPont de Nemours*, 118 F. Supp. 41, 207 (D.C. Del. 1953).

No allegations in the amended complaint herein demonstrate that the defendant either possessed market control or engaged in acts and practices so approaching monopoly control as to create a dangerous probability thereof. Hence there is no factual predicate for the application of Section 2 of the Sherman Act. Mere allegations of annual business volume or total number of out-

lets are totally insufficient. *Mackey* v. *Sears, Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956). See also *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 533 (1948).

Plaintiffs' claim under the Sherman Act is further deficient in failing to allege any act or conduct evidencing intent to abuse, maintain or exercise monopoly power or facts demonstrating the existence of a specific intent to monopolize as is required to sustain the offenses charged. *United States* v. *Griffith*, 334 U.S. 100 (1948); *American Tob. Co.* v. *United States*, 328 U.S. 781 (1946); *Swift and Co.* v. *United States*, 196 U.S. 573 (1905). The acts and conduct alleged as shown in the discussion of plaintiffs' claim under Section 3 of the Clayton Act, *supra*, demonstrate no more than a permissible refusal to deal on the part of the defendant. Since the defendant possessed the legal right to terminate the franchises of its dealers for reasons sufficient to itself, the exercise of this right is not a violation of the Sherman Act or Clayton Act. See *Brosious* v. *Pepsi-Cola Co.*, *supra*; *Dublin Distributors* v. *Edward and John Burke, Ltd.*, *supra*. See also *ABC Distributing Co.* v. *Distillers Distributing Corp.*, 316 P.2d 71 (Cal. App. 1957).

The amended complaint does not allege a violation of Section 2 of the Sherman Act.

Conclusion

It is concluded that the amended complaint does not allege any violation of Section 3 of the Clayton Act or Section 2 of the Sherman Act. It does not state a claim upon which relief can be granted under the antitrust laws. The motion to dismiss the amended complaint is hereby granted.

(Signed) Ashton H. Williams,
United States District Judge.

November 13th, 1958.

No. [illegible]

Supreme Court of the United States

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 682

Supreme Court of the United States

OCTOBER TERM, 1961

WESTERN AUTO SUPPLY COMPANY, PETITIONER,

versus

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE AND HARRY CLINK-SCALES, RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT

This suit was commenced under Section 3 of the Clayton Act (15 U.S.C. § 15) seeking treble damages for claimed violations of the antitrust laws of the United States. The original complaint was filed on June 3, 1957, and thereafter respondents voluntarily filed their first amended complaint (R. 22, 31-61; Appendix, infra, pp. A4-5). Petitioner moved to dismiss the first amended complaint

for failure to state a claim and on November 18, 1958, the District Court entered its order sustaining the petitioner's motion (R. 22; Appendix, infra, pp. A5, A26-39). Respondents appealed from that ruling to the court below. On July 16, 1959, the Fourth Circuit handed down its opinion stating (Appendix, infra, pp. A23-24):

> "The complaint has been once amended, and apparently there was no application for further amendment. Under the circumstances, we might appropriately affirm without affording the plaintiffs any additional opportunity to plead over. However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreemnt or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

At the conclusion of this opinion, the Court below stated (Appendix, infra, p. A25):

> "While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.
>
> "**Affirmed and remanded.**"

On September 1, 1959, respondents filed a motion "To Amend Complaint in Conformance with Opinion of the United States Court of Appeals for the Fourth Circuit" (R. 3) and appended thereto was their proposed second amended complaint (R. 3-22). Petitioner opposed the motion on the ground, *inter alia*, that the District Court was

without jurisdiction to entertain the motion because the final order of dismissal entered by the District Court on November 18, 1958, had never been vacated or modified and at no time had respondents applied to any court for an order vacating or modifying the order of dismissal. The District Court in its opinion and order dated April 11, 1960 (R. 22-31; Appendix, infra, pp. A4-14) stated that it was unnecessary for the Court to pass upon the jurisdiction question raised by the Petitioner because it was overruling the Motion for leave to Amend on the merits. Respondents appealed and on November 2, 1960, the court below filed a *per curiam* opinion reversing the District Court. Even though the Petitioner, in its brief and oral argument, pursued the question here raised, nevertheless, the Fourth Circuit summarily overruled the point, merely stating in this regard (R. 92-93; Appendix, infra, p. A2):

> "When this treble damage action for violation of the anti-trust law came here in an earlier appeal we remanded the case to afford the plaintiffs an opportunity to apply to the District Court for leave to amend their complaint. An amended complaint was submitted by the plaintiffs to that court together with an appropriate motion for leave to file the same."

Accordingly, judgment was entered on the same date remanding the case to the District Court for further proceedings in accordance with the opinion (R. 94; Appendix, infra, p. A1).

REASONS FOR REFUSING WRIT

The Respondents, for reasons hereinafter stated, believe that there is no conflict between the decision of the court below and the decision of the Court of Appeals for the Eighth Circuit in *Young v. Garrett*, 159 F. (2d) 634 (1947). Further, respondents believe that petitioner's application for a writ of certiorari does not raise any question as to whether this Court should disturb the judgment of the

court below remanding the case to the District Court for further proceedings in accordance with its opinion.

1. The court below did not enter a judgment unconditionally affirming the original order of dismissal by the District Court; rather, that Court stated (Appendix, infra, p. A25):

> "While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.
>
> "Affirmed and remanded."

The reasons given by the Court of Appeals for the Fourth Circuit in making its affirmance conditioned upon the right of the respondents to file an Amended Complaint, were (Appendix, infra, p. A24):

> "However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreement or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

Apparently, the Fourth Circuit was impressed by the statements of respondents in their brief and in oral argument that petitioner had compelled franchised retailers to handle its full line of products. Yet, the Fourth Circuit found that respondents' complaint contained no clear-cut allegations that this was pursuant to a condition, agreement or understanding violative of the Clayton Act (Appendix, infra, p. A22). Since the respondents, in their

brief, repeatedly asserted that their complaint contained express and implied allegations sufficient to meet the requirements of the statute, the Fourth Circuit felt that it was in the interest of substantial justice to permit them to reformulate the complaint and state the requisite statutory conclusions in unequivocal terms (Appendix, infra, p. A24).

In other words, the Fourth Circuit, in its first opinion took the position that technically the District Court was correct in dismissing the Complaint but that it was obvious to the Fourth Circuit that substantive allegations contained in the Complaint were sufficient to state a cause of action providing the requisite allegations couched in the statutory language accompanied such substantive allegations. It was for this reason that the Fourth Circuit conditionally affirmed the District Court's rulings. As was stated by the Fourth Circuit in its opinion (Appendix, infra, A24):

> "This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League*, 352 U. S. 445 (1957)."

The petitioner is in error when it argues that the court below originally entered a judgment unconditionally affirming the original order of dismissal by the District Court.

2. In its *per curiam* opinion dated November 2, 1960, the Fourth Circuit Court of Appeals stated that respondants filed an **appropriate motion** for leave to file the amended complaint with the District Court (Appendix, infra, A2). (Emphasis added.)

When confronted with petitioner's contention, during oral argument, to the effect that respondents had never made application to the District Court pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure, following

the conditional affirmance of the original order of dismissal by the Court of Appeals, for relief from that order, the Chief Judge of the court below, from the Bench, stated that it was not necessary for respondents to have done so since the Court of Appeals, by its order, specifically granted this right to the respondents to file an amended complaint in the District Court. Nevertheless, it was pointed out that even if it were necessary under the Federal Rules for respondents to first make application to the District Court pursuant to Rule 60 (b) for relief from the conditional affirmance of the original order of dismissal by the Court of Appeals, that the motion for leave to amend the complaint had the effect of seeking such relief.

This view, that the respondents' motion for leave to file the amended complaint in conformance with the opinion of the Fourth Circuit, should be treated as a motion to vacate the prior judgment under Rule 60 (b), although mislabelled, is sustained by all of the authorities.

In 7 Moore's Federal Practice, Section 60.27 (1), Page 299, it is stated:

> "Since nomenclature is important, the moving papers may be treated as a motion under 60 (b), although mislabelled."

In Footnote 32, sustaining this statement, there is to be found the following:

> "*In re Estate of Cremidas* (D Alaska 1953), 18 FR Serv 60b.29, Case 3, 14 FRD 15 (mislabelled petition for writ or *coram nobis*); *United States v. Backofen* (CA3d, 1949), 176 F2d 263, 12 FR Serv 60b.29, Case 2 (letter to district court treated as a motion to open and set aside default denaturalization judgment); see *Sebastiano v. United States* (ND Ohio 1951), 103 F2d 278, 15 FR Serv 60b.29, Case 2 (for purpose of ruling court treated an independent action as a motion for relief under 60 (b) (6), aff'd (CA6th, 1952), 195 F2d 182; and see 59.04 (7), 60.18 (8), supra; 60.28 (3), infra."

There can be no contention that the motion for leave to file the amended complaint was not timely made since the opinion of the court below was dated July 16, 1959 and the motion in the District Court was filed on September 1, 1959.

3. There is no conflict between the decision of the court below and the judgment of the Court of Appeals for the Eighth Circuit in *Young v. Garrett*, 159 F. (2d) 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young v. Garrett*, 5 F.R.D. 117 (1946).

When the decision in *Young v. Garrett, supra*, was handed down, Rule 60 (b) was entirely different from the present Rule 60 (b). This fact was overlooked by the District Court when it stated that there appears to be considerable merit in petitioner's contention that there was a conflict between the decision in *Young v. Garrett* and the ruling of the court below in the instant case.

Rule 60(b) was extensively revised in 1946 after the decision in *Young v. Garrett*. At the time of the *Young v. Garrett* decision, Rule 60 (b) was as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, USC, Title 28, § 118, a

judgment obtained against a defendant not actually personally notified."

Furthermore, the factual situation in *Young v. Garrett* is entirely different from that presented in the case at Bar.

In *Young v. Garrett*, on September 14, 1933, a judgment was entered by the District Court dismissing the Complaint. On appeal, the judgment of the District Court dismissing the complaint was affirmed by the Eighth Circuit on May 1, 1945. Thereafter, the Plaintiffs filed a petition for rehearing and on August 8, 1945, the Eighth Circuit denied the petition for rehearing but directed that the case be remanded to the District Court to permit the Plaintiffs to apply for leave to amend the complaint providing application be made not later than October 1, 1945. The Plaintiffs filed their motion for permission to amend on September 24, 1945.

The District Court in its opinion in 5 F.R.D. 117 (1946) on page 121 ruled that:

"The motions for leave to file the tendered amended and substituted complaints were filed more than two years after the judgments of dismissal were entered. * * * To permit an amendment now, it would be necessary for this court to modify the judgments appealed from and affirmed. This court does not have such power. Rule 60 (b), Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c."

On Page 121, the District Court further stated:

"Rule 60 (b) limits the time when a court may relieve a party or his legal representatives from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect to six months. 'The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken.'

"There were no reservations in the judgments rendered herein, and nothing remained for the court to do.

The cases were dismissed and costs were adjudged against plaintiffs, and the judgments were affirmed." (Emphasis added.)

In the case at Bar, on the contrary there were reservations in the judgments entered; namely, in the conditional order of the Fourth Circuit itself.

At the time of the decision in *Young v. Garrett*, as has been pointed out, Rule 60 (b) was very restrictive:

> "The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken."

In the case at Bar, the Order of the District Court dismissing the complaint was dated November 18, 1958 and the motion for leave to file the amended complaint in conformance with the opinion of the Fourth Circuit Court of Appeals was filed on September 1, 1959. As has already been pointed out, the motion for leave to file the amended complaint, even though mislabelled, should be treated as a motion to vacate the judgment as well as a motion for leave to amend the complaint.

As Rule 60 (b) now reads, the one year limitation on filing a motion to vacate a judgment in the District Court applies only to reasons 1, 2 and 3; under reason 6 of Rule 60 (b) any other reason justifying relief from the operation of the judgment, "there is no time limitation".

Even if it should be argued that respondents motion for leave to amend the complaint should not be treated as a motion for relief under Rule 60 (b) (6), it would still be proper and timely for respondents to now file such a motion if for any technical reason such should be necessary.

The respondents did not deem it necessary to specifically move to vacate the judgment entered by the District Court on November 18, 1958 at least until after the District Court had first given them permission to amend the com-

plaint, since there would be no basis upon which to premise such motion, if such motion were necessary at all in view of the Fourth Circuit's opinion. The respondents took the position that it was implicit in the order of the court below that there was no final disposition of the matter until after the motion for leave to file the amended complaint had been heard and disposed of and hence no final judgment to vacate.

The respondents understood the opinion of the Fourth Circuit to give them the right to file such motion without first having to apply to the District Court for relief of the judgment of that Court dated November 18, 1958 because the respondents did not understand the Fourth Circuit's affirmance to be an unconditional affirmance of the District Court's Order of November 18, 1958.

Nevertheless, as has been stated above, if the Fourth Circuit's Order of July 15, 1959 was in fact an unconditional affirmance of the District Court's Order, then under accepted authorities, this motion in the District Court dated September 1, 1959 for leave to amend the complaint should be construed as containing a motion to vacate the prior judgment of November 18, 1958. If this motion could not be so construed, then respondents respectfully submit that under the present wording of Rule 60 (b) (6) time has not run against the respondents to now make such a motion and that, as a matter of law the District Court must vacate the judgment in view of the Fourth Circuit's opinion dated November 2, 1960 which ruled that the amended complaint did state a cause of action under Section 3 of the Clayton Act.

In 6 Moore's Federal Practice, Section 60.03(2), Pages 4020-4021, it is stated:

> "In other words there is 'a reasonable time' limitation for the making of a motion on the basis of any of the six reasons; but there is no definitely prescribed

time limitation on a motion urging reasons (4), (5), and (6). There is, however, a maximum time limitation of one year on a motion urging reasons (1), (2), and (3); and amended Rule 6(b) states that this time period is not subject to enlargement."

As was stated by Mr. Justice Black in *Klapprott v. United States* (1949), 335 U. S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Regardless of the theory relied upon, it would seem that in the instant case, Rule 60(b) should be used as a shield and not a sword so that the respondents may be given their day in Court. Any other application of Rule 60(b)(6) to the case at Bar would not be appropriate to accomplish justice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHESTER D. WARD, JR.,
Attorney for Respondents.